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Arizona Department of Education  
Exceptional Student Services

ARIZONA DEPARTMENT OF EDUCATION  
Stephen H. Leshner, Due Process Hearing Officer  
5151 E. Broadway, Tucson, Arizona  
(520) 747-7790; fax (520) 747-7370

[REDACTED] by and through  
his parents, [REDACTED]  
[REDACTED]

Petitioner

v.

GASDEN ELEMENTARY SCHOOL  
DISTRICT

Respondent

No. 05-037

**IMPARTIAL DUE PROCESS  
HEARING DECISION AND ORDER**

Hearing Dates: November 16, 17, 18  
2005

Gasden Elementary School District  
Offices, 1543 N. Main, San Luis,  
Arizona

Parents:

[REDACTED]

Counsel for District:

Steven B. Horton  
Mangum, Wall, Stoops & Warden, P.L.L.C.  
P.O. Box 10  
Flagstaff, Arizona 86002

An index of names is attached to permit identification of the witnesses. The index is to be detached before release of this Decision and Order as a public record.

1 The Parents filed a Request for Due Process on April 14, 2005. The  
2 District moved for dismissal or summary disposition, arguing that all issues had  
3 been concluded in a prior Due Process proceeding. A Decision and Order issued  
4 in that matter by Hearing Officer Vance on April 12, 2005 was affirmed on Level  
5 II review on June 10, 2005. That proceeding, however, expressly excluded  
6 issues arising out of an IEP dated February 2005, addressing instead prior IEPs  
7 (Impartial Due Process Hearing Decision and Order April 12, 2005, p. 2). This  
8 Hearing Officer therefore denied the District's motion in part, ruling that issues  
9 presented under the February 11 IEP could be heard. The motion was granted  
10 as to two issues not stated with the required specificity.

11 After a number of continuances and extensions of the 45-day deadline to  
12 accommodate the parties, the hearing was held on November 16, 17, and 18,  
13 2005.

14 Between the first and second days of testimony the parties agreed to and  
15 did convene a new IEP meeting, which resulted in the drafting of a proposed  
16 replacement for the February 11 IEP. Several issues contested at the hearing  
17 concerned the adequacy of notice given the parents of the February 11 IEP  
18 meeting. Because under these facts the relief for inadequate notice would have  
19 been to order another, properly-noticed, meeting to prepare another IEP, and  
20 because that had now occurred, the notice issues were dismissed on the second  
21 day of the hearing as moot.

22 The Hearing Officer also ordered the parties continue in good faith to  
23 work toward a new IEP. The Hearing Officer is informed that the new IEP has  
24 now been agreed upon and signed (District's Post-Hearing Memorandum, p.4).

25 Another issue concerned the District's alleged refusal to provide an  
26 independent occupational evaluation. Parents withdrew that issue on the third  
day of the hearing.

The issues remaining are:

1. Whether the IEP impermissibly failed to adopt certain therapy recommendations;
2. Whether the IEP impermissibly failed to designate who would be "responsible/accountable for" development of the student's gross motor skills, fine motor skill, fine motor coordination, and "functional reaching";
3. Whether the District failed to implement the IEP in the areas of OT, PT, and Speech, and specifically
  - a. whether "time and goals" were insufficiently documented;
  - b. whether required gait training was provided;
  - c. whether use of the "Tech Talk" device was insufficient;
4. Whether the District failed adequately to protect the Student's privacy by exposing his and other students' "personal body parts" by changing diapers in the classroom rather than the rest room

The parties' exhibits – Parents' A through T, District's 1 through 88 – were received without objection. (The parties offered many of the same documents as exhibits. For purposes of clarity and consistency, the Hearing Officer will refer to those exhibits using the District's exhibit number.) Both parties presented witnesses. The Hearing Officer had reviewed the transcript of the April 2005 hearing, Hearing Officer Vance's Decision and Order, and the Level II Review decision. Background and foundation for all witnesses who had testified at the April hearing were accepted as set forth in that transcript.

The Hearing Officer finds and concludes as follows:

#### FINDINGS OF FACT

1. [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 2. Student's mental age, depending on the task, is [REDACTED] (Testimony  
7 of Special Education Director; Exhibit 44)

8 3. Parents are Student's passionate advocates; their aggressive concern to  
9 share involvement in and control over his service plans and the day-to-day  
10 provision of services has resulted in considerable conflict with the District.  
11 Father has continued the type of conduct described in Hearing Officer Vance's  
12 Finding 4:

13 Father has written extremely harsh, demanding letters, often  
14 threatening legal action against District, whenever Father believed  
15 that Student was treated improperly or that Student was not  
16 receiving all special education and related services that Father  
17 understood to be appropriate. Father's actual requests were  
18 sometimes reasonable in terms of issues raised, but even those  
19 reasonable requests routinely included accusatory and often harsh  
20 language that was not justified by the circumstances, and that was  
21 often unfounded on legal grounds

22 4. During the present school year (beginning in August 2005) Student  
23 had attended school only every other Thursday and has missed over fifty  
24 instructional days. (Testimony of Father)

25 5. Parents instead instruct the student at home [REDACTED]  
26 [REDACTED], though there is no evidence that Mother has any  
formal teaching qualifications) and obtain physical therapy services from a  
provider in Mexico, from a person Parents refuse to identify (but who the  
evidence suggests is a licensed physical therapy provider, probably a physical-  
therapist aide), and from Parents as assisted by high-school students.  
(Testimony of Father)

1  
2 Issue 1: Adoption of Therapist Recommendations

3 6. The IEP in question was adopted at a meeting held on February 11,  
4 2005. (Exhibit 5)

5 7. In anticipation of the IEP, the team had obtained a number of  
6 evaluations.

7 8. Physical Therapist's evaluation recommended, in relevant part, that he  
8 provide physical therapy sixty minutes twice a week. (Exhibit 41)

9 9. Although he is qualified to work with Student, Physical Therapist's  
10 background is in clinical practice; he has little experience working with children  
11 or schools. (Testimony of Physical Therapist)

12 10. The IEP calls for physical therapy sixty minutes once a week. (Exhibit  
13 5)

14 11. The team considered Physical Therapist's recommendation but  
15 determined that for purposes of allowing Student to benefit from his educational  
16 plan, when supplemented by the other activities and services provided at the  
17 school, sixty minutes per week (which Students' prior IEPs had also called for)  
18 was appropriate. (Testimony of Former Special Education Director; Exhibit Q  
19 pages 4-6)

20 12. The IEP's physical therapy provision met Student's needs. (Testimony  
21 of Former Special Education Director, Former Physical Therapist, Expert  
22 Witness)

23 13. Student made adequate progress toward physical therapy goals while  
24 he was attending school regularly. Since then, Father indicates that progress  
25 continues, though Special Education Teacher has observed that Student seems  
26 to be losing extension in his right leg. (Testimony of Special Education Teacher,  
Father)

14. Prior to February 11, various devices – including versions of the Tech

1 Talk device – had been used to attempt to facilitate Student’s communication.  
2 (Testimony of Special Education Teacher; Exhibits 59, 60, 61)

3 15. Student had not worked successfully with the devices. (Testimony of  
4 Former Special Education Director, Special Education Teacher)

5 16. The IEP team therefore accepted Speech Pathologist’s  
6 recommendation for an evaluation to determine which device was best for  
7 Student; in the meantime, the Tech Talk continued to be used and the IEP  
8 provided for the use of unspecified communication “devices.” (Testimony of  
9 Former Special Education Director, Special Education Teacher, Speech  
10 Pathologist; Exhibit 5)

11 17. The resulting evaluation by United Cerebral Palsy of Southern Arizona  
12 recommended a form of Tech Talk device. The District purchased the device;  
13 Parents were provided one by the Department of Developmental Disabilities.  
14 (Testimony of Father, Former Special Education Director; Exhibit 43)

15 18. This action was consistent with the recommendations of the Speech  
16 Pathologist, United Cerebral Palsy, and Student’s needs. (Testimony of Speech  
17 Pathologist)

18 19. The IEP’s speech therapy provision met Student’s needs.

## 19 Issue 2: Designation of responsible persons

20 20. The IEP establishes goals and objectives in the areas of “Gross Motor  
21 Skills,” “Fine Motor Skills,” and “Fine Motor Coordination, Functional  
22 Reaching.” (Exhibit 5)

23 21. The IEP properly and adequately identifies by specialty, though not by  
24 name (“OT/OTA”, “PT”), those who were to provide physical and occupational  
25 therapy services. (Exhibit 5, p. 15)

26 22. While Student was attending school, physical and occupational  
therapy was delivered by licensed therapists or their aides as specified in the

1 IEP and was supplemented by activities carried out by classroom aides as  
2 recommended by the therapists. (Testimony of Former Special Education  
3 Director, Special Education Teacher, Father)

4 23. Parents have at all times known the identities of the therapists,  
5 District staff members, and other individuals providing services to Student.  
6 Indeed, they have not hesitated to express vehement displeasure with those who  
7 they decide have not acted satisfactorily, to attempt to have such individuals  
8 censured and disciplined, and to insist that certain persons may not work with  
9 Student or with Parents. (Testimony of Father; e.g., Exhibit 17)

10 24. In all respects the February 11, 2005 IEP was reasonably calculated  
11 to confer educational benefit on Student.

### 12 Issue 3: Implementation

#### 13 Physical and occupational therapy

14 25. In significant part, Parents' claim is that services were not provided  
15 because they were not documented. (Parents' Post Hearing Brief)

16 26. The District has gone a remarkably long way to accommodate Parents'  
17 demands for meticulous documentation. The service providers themselves have  
18 also documented their services. This documentation generally demonstrates  
19 the provision of physical and occupational therapy services called for by the IEP.  
20 (e.g., Exhibits 47-55, 57, 59, 70, 75, L, M, N)

21 27. Student did, however, miss an indeterminate but small number of  
22 hours of direct occupational therapy due to Occupational Therapist's decision  
23 not to work with the District after March 19, 2005. (Exhibit 56).

24 28. Occupational Therapist's decision resulted from Father's filing a  
25 complaint against him with the Arizona Board of Occupational Therapy  
26 Examiners because Father was unhappy with the evaluation Occupational  
Therapist had provided for the February 11 IEP. (Testimony of Physical  
Therapist)

1        29. Special Education Teacher and his aides continued to provide  
2 Student classroom services in physical and occupational therapy during the  
3 time an occupational therapist was unavailable. (Testimony of Physical  
4 Education Teacher; Exhibits M, N)

5        30. Student continued to progress toward physical and occupational  
6 therapy goals while an occupational therapist was unavailable.

7                    Tech Talk device

8        31. Speech Therapist used various modalities and devices with Student,  
9 often including the Tech Talk device. (Testimony of Special Education Teacher,  
10 Speech Pathologist)

11        32. Student was not yet able to make purposeful use of the device,  
12 generally treating it as an object of play rather than as an instrument of  
13 communication. (Testimony of Special Education Teacher)

14        33. Student repeatedly broke the Tech Talk device by throwing it.  
15 (Testimony of Father, Special Education Teacher)

16        34. The classroom had other Tech Talk devices available; those devices  
17 may have been four-field devices rather than the two-field device used with  
18 Student but a four-field device can be used as a two-field device. (Testimony of  
19 Special Education Teacher)

20        35. During the time he regularly attended school, Student's progress in  
21 the area of communication met expectations. (Testimony of Speech Pathologist)

22        36. At the end of the school year the school retained the Tech Talk device  
23 (Testimony of Father, Speech Pathologist)

24        37. The school did so based on the recommendation of United Cerebral  
25 Palsy trainers, who indicated that the device should stay at school where school  
26 personnel were available to work with Student toward making functional use of  
the device as opposed to playing with it, and on Special Education Teacher's



1 belief that the device was being broken at home. (Testimony of Special  
2 Education Teacher)

3 38. Regardless of whether the device was being broken at home or at  
4 school (as Parents contend), the District's decision not to send it home was  
5 justified by the United Cerebral Palsy recommendation. Although Father has  
6 referred to the Tech Talk as Student's "primary communication device," this is  
7 true only if the emphasis is on "device": it is the primary electromechanical  
8 object by which he has been encouraged to communicate. It is not, however,  
9 Student's primary *means* of communication; there is little evidence that Student  
has made effective use of it except on isolated, arguable occasion.

10 39. Since he ceased attending school full time Student has continued to  
11 make progress in the area of communication, though more slowly than before.  
12 (Testimony of Speech Pathologist)

13 40. It is overwhelmingly more probable that this slower progress is due to  
14 Student's failure to attend school and receive services regularly than to any  
15 failure of opportunity to make more or different use of a Tech Talk device.

#### 16 Issue 4: Diaper Changing

17 41. Student is assigned to the school's Life Skills classroom. The District's  
18 most severely disabled students attend this classroom; all wear diapers.  
19 (Testimony of Principal, Special Education Director)

20 42. Diapers are normally changed in a rest room close to the classroom  
21 but when a student cannot be taken to the restroom because staff are  
22 unavailable or otherwise occupied, or in case of "emergency," (i.e., an immediate  
23 need for changing) they are changed behind a partition in the classroom itself.  
24 (Testimony of Special Education Teacher, Principal)

25 43. The partition, four feet and five-to-six feet wide, is in a corner of the  
26 classroom. The students are placed on a table approximately two feet high. The

1 divider effectively conceals the student from others in the classroom, including  
2 adults. (Testimony of Special Education Teacher)

3 44. Student's diaper has occasionally been changed behind the partition  
4 rather than in the restroom but there is no evidence that anyone other than the  
5 staff members changing him have been able to observe him.

6 45. Father feels that changing his diaper in the classroom harms  
7 Student's self-esteem. There is no evidence that Student or his classmates have  
8 any concern, or even awareness, about the matter.

9 46. Changing Student's diaper in the classroom does not interfere with  
10 the provision of education or related services.

#### 11 Required Arizona Findings

12 47. The evaluation procedures utilized in determining Student's needs  
13 have been appropriate in nature and degree.

14 48. The diagnostic profile of Student on which the placement was based  
15 is substantially verified.

16 49. Student's rights have been fully observed.

17 50. Student's placement is appropriate to his needs.

18 51. Student's placement in special education is with the written consent  
19 of Parents.

#### 20 CONCLUSIONS OF LAW

21 1. Two days before this hearing the United States Supreme Court issued  
22 its opinion in *Schaffer v. Weast*, 2005 U.S. Lexis 8554. The Hearing Officer  
23 informed the parties at the beginning of the hearing that his initial reading of  
24 the case suggested that it placed the burden of proof on Parents in this case.  
25 *Schaffer* does so hold. However, each of the above Findings is based on a  
26 preponderance of the evidence, not on a failure of evidence.

1        2. An IEP team is not required in every instance to accept the  
2 recommendations contained in evaluations. By considering the evaluations and  
3 then modifying them appropriately to meet Student's educational needs, the  
4 team met its obligations. A team need not and should not merely rubber-stamp  
5 recommendations, much less those made by evaluators unfamiliar with the  
6 educational setting.

7        3. An IEP need not name specific persons who must provide services or be  
8 "responsible/accountable for" the student's progress. The District itself is  
9 responsible for providing the needed services, 34 C.F.R. §300.350.

10       4. Parents have no right to determine unilaterally which service providers  
11 may or may not work with Student.

12       5. There is no evidentiary basis for an award of compensatory education.

13       6. The question of who "owns" a Tech Talk device purchased for Student  
14 by an outside agency, which Parents have raised, is irrelevant to this  
15 proceeding. The IDEA requires the District to make educational decisions on  
16 grounds other than debatable points of personal property law.

17       7. Parents argue that the diaper problem is an IDEA issue because "self-  
18 esteem issues affect performance in the educational setting" (Parents' Post  
19 Hearing Brief, p. 9). While that may hypothetically be true, the evidence does  
20 not establish that that is factually true in this case and the matter therefore  
21 does not, even under Parents' analysis, rise to the level of an IDEA violation.

22       8. Changing Student's diaper in the classroom does not deny, limit, or  
23 improperly condition the provision of education or related services.

24       9. Father has expressed a desire for a determination that "mistakes were  
25 made" (i.e., by the District). A declaratory ruling allocating blame is not the  
26 point of Due Process. The Hearing Officer will make no findings or conclusions  
directed to the emotional satisfaction of the adults rather than to the  
educational needs of the Student.

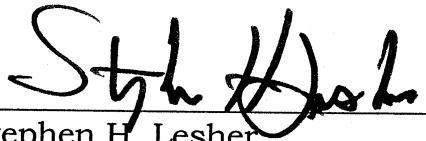
1 10. The District has provided Student a free, appropriate, public  
2 education.

3 11. Parents have now had a full and fair opportunity to contest all issues  
4 that were or could have been raised arising out of the February 11, 2005 IEP.

5 12. Parents have now had a full and fair opportunity to contest the  
6 District's practices regarding changing Student's diapers.

7 Parents' request for relief is denied.

8 By

 11/30/05  
9 Stephen H. Lesh  
10 Due Process Hearing Officer

11  
12  
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19 Appeal

20 The decision of the Impartial Due Process Hearing Officer may be appealed by  
21 submitting a written request for an appeal with the Exceptional Student Services  
22 Division of the Arizona Department of Education (ADC/ESS). The ADE/ESS shall  
23 forward the request to the Arizona Office of Administrative Hearings, which shall  
24 conduct an Administrative Review of the Impartial Due Process Hearing. The request  
25 for an appeal shall be accepted only if the request is initiated within 35 calendar  
26 days after the decision of the Impartial Due Process Hearing Officer has been  
received by the parties. Written requests for an appeal must be sent to the Dispute  
Resolution Coordinator, Arizona Department of Education, Exceptional Student  
Services, 1535 West Jefferson, Phoenix, Arizona 85007